In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-1680

IN RE MARY ALICE RELF, MINNIE RELF and KATIE RELF, by and through their next friend, LONNIE RELF, *Petitioners*

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit

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Petitioners Mary Alice Relf, Minnie Relf, and Katie Relf, by and through their next friend, Lonnie Relf, respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the denial of Petitioners' Petition for a Writ of Mandamus to compel the District Court for the District of Columbia to hold an evidentiary hearing to determine whether to admit Mr. Melvin M. Belli *pro hac vice* to try a case before it.

The denial of the motion to admit Mr. Belli to appear *pro hac vice* was made in open court on November 8, 1976. The Petition for Writ of Mandamus was filed on December 1, 1976, and a Supplemental Brief was filed on January 28, 1977. The Court of

Appeals for the District of Columbia Circuit denied the Petition for a Writ of Mandamus on March 3, 1977.

OPINION BELOW

The Order of the United States Court of Appeals for the District of Columbia Circuit denying the Petition, including Circuit Judge Leventhal's dissent, appears as Appendix A hereto. The transcript of the proceedings before the Honorable Oliver Gasch, United States District Judge, District of Columbia, is appended hereto as Appendix B.

JURISDICTION

The denial of Petitioners' Petition for Writ of Mandamus was entered on March 3, 1977. This Petition has been filed within ninety days thereof. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a District Court can summarily deny the motion of a member of the bar to admit *pro hac vice* an attorney duly licensed to practice in another jurisdiction and a member in good standing of the bar in that jurisdiction, when the denial is based upon the attorney's exercise of rights guaranteed by the First Amendment of the Constitution of the United States.

STATUTORY PROVISION INVOLVED

United States District Court for the District of Columbia Rule 1-4(a)2:

> An attorney who is a member in good standing of the bar of any United States Court or of the highest court of any state, but who does not qualify under the requirements of Subsection (1) above may enter an appearance and file pleadings in this Court provided that such attorney joins of record a member of the bar of this Court who does meet the requirements of Subsection (1) and who will at all times be prepared to go forward with the case. If such an attorney wishes to be heard in open court, he must in addition secure the permission of the trial judge.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

STATEMENT OF THE CASE

On November 8, 1976, a motion was made to the United States District Court for the District of Columbia to admit Melvin M. Belli, Esq., a member of the California Bar, *pro hac vice* for purposes of trial in the case of *Relf v. United States,* Civil No. 74-224 (D.D.C., filed Feb. 4, 1974). The case concerns two Alabama citizens who at ages 12 and 14 were involuntarily and permanently surgically sterilized under

a program funded by the United States Department of Health, Education and Welfare.

The motion to admit Mr. Belli *pro hac vice* was made by Henry Weil, Esq., of the District of Columbia Bar. At the time of the motion Mr. Belli was a member in good standing of the bar of the State of California. He had complied with all local rules, including Rule 1-4(a)2 of the District of Columbia. Rule 1-4(a)2 requires only that an attorney who seeks to be admitted *pro hac vice* be a member in good standing of the bar of any United States Court or the highest court of any state and that he join of record a member of the bar of the Court. Additionally, if he wishes to be heard in open court, the attorney must obtain the trial court's permission.

In spite of Mr. Belli's compliance with the local rules, the Honorable Oliver Gasch, the trial judge, summarily denied Mr. Belli's application to be admitted to practice in the district. In fact, the transcript reveals that Judge Gasch, purportedly relying upon a "prior ruling" in a totally unrelated case, would not even permit a written motion and order on Mr. Belli's behalf to be filed with the Court:

> MR. WEIL: . . .
>
> At this time . . . Your Honor, preliminarily, I'd like to file with the Court to admit as co-counsel along with Mr. Russell for purposes of trial, the admission pro hac vice of Melvin M. Belli.
>
> THE COURT: The Court has ruled on Mr. Belli's status. That will be denied. . . .
>
> MR. WEIL: Would Your Honor want to accept the papers for filing?

> THE COURT: The Court has ruled on Mr. Belli's proposal.
>
> Transcript of proceedings, *In re Relf,* Nov. 8, 1976.

The trial court's statement that it had already "ruled" on Mr. Belli's status apparently referred to a decision rendered three years earlier in an entirely different matter. In that decision, *In re Belli,* 371 F. Supp. 111 (D.D.C. 1974), the same trial judge had denied Mr. Belli's admission *pro hac vice* in a medical malpractice case because of comments made in the course of a nationally broadcast television appearance on the "Merv Griffin Show."[1] Mr. Belli's statements obliquely referred to the case of *Morris v. Children's Hospital,* Civil No. 575-71 (D.D.C. Apr. 18, 1973), in which he represented a child who had been blinded through the negligence of a local hospital.[2] The $900,000 jury verdict in favor of the child was set aside by a trial judge who had failed to reveal that his son belonged to a firm which represented the District of Columbia Medical Society, whose membership included ninety percent of the physicians in the District of Columbia and all of the witnesses who appeared for the defendant hospital during the trial.

Following Mr. Belli's televised remarks, all fourteen of the judges of the Washington, D.C. federal

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[1] The text of Mr. Belli's remarks appears in *In re Belli, supra,* 371 F. Supp. at 112-13 n.6.

[2] In point of fact, Mr. Belli never mentioned Judge Smith, the trial judge, or the *Morris* case by name on the Griffin show; these facts were revealed only when the judges themselves issued a public resolution which is described more fully *infra.*

district court met in secret "executive session" on June 22, 1973, and adopted a resolution summarily finding Mr. Belli guilty of failing to "maintain a respectful attitude toward the court."[3]

Although Mr. Belli was given no notice whatsoever of the meeting in executive session, no opportunity to be heard as to his side of the controversy, and no chance to obtain counsel or witnesses in his behalf,[4] the judges nevertheless made public and forwarded the unanimous resolution to the State Bar of California for "such action as you deem appropriate."[5] The only named complainant against Mr. Belli in this action was Judge Sirica, on behalf of the District of Columbia judges. No member of the public ever complained about this matter.

Among the judges participating in this session and approving what amounted to a punishment[6] of Mr.

[3]This was precisely the ultimate finding required under the California State Bar rules to discipline Applicant Belli for unprofessional conduct. Cal. Bus. & Prof. Code §6068(b) (West 1974); *Hogan v. State Bar*, 36 Cal.2d 807, 810, 228 P.2d 554 (1951).

[4]The authorities universally agree that "[e]verywhere [the lawyer subject to disciplinary proceedings] has the right to a full hearing, with ample notice." H. Drinker, *Legal Ethics*, 35 (1953). In fact, the judicial canons themselves require that a judge "accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law," and "neither initiate nor consider *ex parte* communications concerning a pending or impending proceeding." ABA Code of Judicial Conduct, Canon 3.A(4).

[5]"A judge should abstain from public comment about pending or impending proceedings in any court" until the matter is properly adjudicated. ABA Code of Judicial Conduct, Canon 3.A(6).

[6]As Petitioners argued in their Supplemental Brief to the Court of Appeals for the District of Columbia Circuit, the resolution of the federal district court judges was in the nature of a bill of attainder, expressly prohibited by the Constitution. U.S. Const. art. I, §9, cl. 3, §10, cl. 1.

A bill of attainder is a legislative act which inflicts punishment without a judicial trial and the attendant safeguards required at trial. "Punishment" is not restricted to the deprivation of life, liberty or property, but also embraces the suspension, deprivation or extinguishment of political or civil rights. Hence, "exclusion from any of the professions or from any of the ordinary avocations of life may be regarded in no other light than as punishment." *Ex parte Garland*, 71 U.S. (4 Wall.) 277 (1867). *See also, In re Ruffalo*, 390 U.S. 544, 550 (1967).

Petitioners do not dispute that the judges had the right to gather in executive session to consider Mr. Belli's remarks and to pass a resolution authorizing either the commencement of disciplinary proceedings, with due process, against him, or, finding no jurisdiction to do so, to transmit the facts to an appropriate disciplinary body. But they far exceeded their lawful authority by finding Belli, *ex parte* and in secret, guilty of serious offenses against acceptable professional ethics. Their action thus constituted an illegal exercise of quasi-legislative powers and was in the nature of an unconstitutional bill of attainder.

Belli was Judge Oliver Gasch. It was Judge Gasch who subsequently wrote the memorandum opinion which deprived Mr. Belli of the right to appear in a later malpractice case, on the grounds that his Griffin show comments were "calculated to prejudice the standing of this Court and to cast a shadow upon its integrity and that of one of its judges . . . without factual foundation and . . . recklessly made," and that "Mr. Belli acted in complete disregard as to the factual accuracy of his statements." *In re Belli, supra*, 371 F. Supp. at 113-14.

Judge Gasch's opinion resulted from an informal, *in camera* proceeding, the nature and subject matter of which Mr. Belli was not apprised prior to his appearance before the judge. Indeed, Mr. Belli thought that it was an informal discussion in chambers, not a hearing. He was amazed when an "opinion" subsequently appeared in the Federal Supplement. He

had neither the requisite notice to enable him to prepare to meet the false charges hurled against him, nor the opportunity to dispute the factually inaccurate statements which the court later attributed to him. In addition, the failure of the court to make any record of this thoroughly unexpected *in camera* proceeding is highly unusual for a "hearing."

Subsequent to the opinion in ***In re Belli, supra,*** on October 6, 1975, a duly constituted disciplinary committee of the State Bar of California fully exonerated Mr. Belli of charges of professional and ethical misconduct flowing from these comments. After reviewing a massive body of evidence and testimony presented in an exhaustive three-day adversary hearing, the Committee found that the statements made by Mr. Belli, though factually incorrect in certain minor respects, were substantially true; that the charges of unethical or unprofessional conduct lodged against him were unsupported by the facts; and that there was *no* proof that the incidental remarks at issue which were inaccurate had been made recklessly or with gross negligence or with any knowledge of their falsity. The Committee's findings and recommendations appear as Appendix C hereto.

In the wake of the favorable decision by the California State Bar committee, Mr. Belli again sought admission *pro hac vice* in another malpractice case, *Davis v. United States,* Civil No. 75-0843 (D.D.C. 1976). Admission in this case was denied, but Mr. Belli elected not to pursue any appellate remedy at that time because an appeal by the State Bar Ex-

aminer was still pending. By the time of Mr. Belli's application to appear *pro hac vice* in the *Relf* case, however, the Bar's appeal had been unanimously rejected by the State Bar Board of Governors, and Mr. Belli's matter had been finally and definitely resolved in his favor.

The Honorable Judge Gasch refused even to consider these significant developments in summarily denying the *pro hac vice* motion. Petitioners respectfully submit that this arbitrary action by the trial court has deprived Mr. Belli of his cherished right to practice in the District of Columbia without just cause and without affording any of the rudiments of due process; has unduly infringed upon his First Amendment right to speak freely in criticism of public figures without fear of arbitrary reprisals; has flagrantly violated principles of collateral estoppel and comity by failing to give any recognition to a favorable ruling by Mr. Belli's own State Bar, where the matter was sent by Judge Sirica, after an exhaustive adversary hearing; and has illegitimately deprived Petitioners of the right to be represented in this landmark tort/civil rights case by a man of Mr. Belli's significant talent and the experience obtained in his forty years of practice before courts throughout the United States and the world.

Petitioners seek review by this Court of the denial of their Petition for Writ of Mandamus by way of this Petition for a Writ of Certiorari, in order to avert the irreparable harm to Mr. Belli and his clients which will otherwise ensue from the trial

court's failure to exercise its discretionary power, its gross abuse of that power to the extent exercised, and the court's failure to perform its ministerial duties in a fair and constitutionally legitimate fashion.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE DISTRICT COURT PUNISHES THE EXERCISE OF CONSTITUTIONAL RIGHTS AND DENIES MR. BELLI DUE PROCESS.

1. The trial court's decision punishes Mr. Belli for the exercise of rights protected by the First Amendment.

It may be argued that regardless of Mr. Belli's exoneration of any actionable misconduct by the State Bar of California, a federal trial court may nevertheless, in its discretion, find the television show statements to be sufficiently "unlawyerlike" to permit it to bar Mr. Belli's admission *pro hac vice*. Such an argument must fail on constitutional grounds.

Mr. Belli's television comments come within the ambit of the First Amendment to the United States Constitution. Though inaccurate in minor respects, the comments are protected speech because, as determined by the State Bar of California, they were not made in conscious knowledge of their falsity or in reckless disregard of the truth. *In re Relf*, No. 76-2073 (D.C. Cir. Mar. 3, 1977) (Leventhal, C. J., dissenting). Mr. Belli may therefore not be punished either criminally or civilly for their utterance. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276, 270-80 (1964). In fact, the principle anounced in *New York Times* was specifically made applicable to state-

ments directed at judicial officers. Thus, this Court observed:

> Injury to official reputation affords no more warrant for repressing free speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify punishment as criminal contempt of criticism of the judge or his decision. This is true even though the utterance contains "half-truths" and "misinformation". Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. 376 U.S. at 272-73 (citations omitted).

In a series of decisions involving the constitutionality of a trial court's power to hold persons in contempt for offensive published statements, the Supreme Court has consistently held that "[f]reedom of discussion should be given the widest possible range compatible with the essential requirement of the fair and orderly administration of justice." *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946). Consequently, absent an imminent threat to the administration of justice, a judge may not punish one "who ventures to publish anything that tends to make him unpopular or to belittle him . . . ." *Craig v. Harney*, 331 U.S. 367, 376 (1947); *see also, Wood v. Georgia*, 370 U.S. 375, 389 (1962). This Court has long stated such a view to be the only one consistent with the First Amendment or common sense:

> The assumption that respect can be won by shielding judges from published criticism wrongly

> appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more that it would enhance respect. *Bridges v. California,* 314 U.S. 252, 270-71 (1941) (footnotes omitted).

Since the trial court could not have held Mr. Belli in contempt for his comments, nor could the judge against whom the comments were directed have sued civilly for libel, it follows that the trial court may not now punish Mr. Belli for these same remarks by denying him the right to practice his profession before it. Absent "malice", the laws and courts may not be used to inhibit constitutionally protected speech by punishing those who avail themselves of their First Amendment right to speak. *New York Times Co. v. Sullivan, supra,* 376 U.S. at 276.

Nor is judicial discretion to admit an attorney *pro hac vice* a cloak for ransoming the First Amendment. If Mr. Belli was entitled to speak at all, a court may not, as a consequence, deny him the means to practice his profession in a court of the United States, and thereby deny the Relfs the right to the counsel of their choice. An attorney does not forfeit the protection of the Constitution simply because he is an officer of the court.

2. The trial court's decision deprives Mr. Belli of the right to practice and imposes upon him a "badge of infamy" without due process.

The district court's action in summarily denying Mr. Belli admission *pro hac vice* is constitutionally infirm in that it completely fails to afford him procedural due process before excluding him from practicing law before the court. This basic constitutional safeguard, which attorneys *must* be afforded, was discussed by this Court in *Willner v. Committee on Character and Fitness,* 373 U.S. 96, *clarification denied,* 375 U.S. 950 (1963), as follows:

> . . . [T]he requirements of procedural due process must be met before a State can exclude a person from practicing law. "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." . . . [T]he right is not "a matter of grace and favor." 373 U.S. at 102 (citations omitted).

The Court held there that due process requires that before denial of an application for admission to the bar for lack of the requisite character and fitness, the applicant *must* be given an opportunity to refute the evidence introduced against him and to cross-examine witnesses who supply information adverse to him. *Willner v. Committee on Character and Fitness, supra,* 373 U.S. at 104. This rule is applicable to federal district judges who attempt to disbar attorneys without first granting them a hearing or an opportunity to be heard. *Burkett v. Chandler,* 505 F.2d 217, 222 (10th Cir. 1974).

In the recent case of *In re Evans,* 524 F.2d 1004 (5th Cir. 1975), where the petitioner raised issues identical to those now before this Court, the Fifth Circuit recognized the constitutional imperative of affording a hearing to an attorney before denying him admission *pro hac vice:*

> If a District Court has evidence of behavior that it believes justifies denying an attorney admission *pro hac vice,* it must set a hearing date and give the attorney adequate notice of all incidents of alleged misbehavior that will be charged against him. Specific allegations must be made; general accusations about an attorney's demeanor are insufficient. The hearing must be on the record and present the attorney with adequate opportunity to defend himself and his professional reputation. 524 F.2d at 1008.

The conclusion reached in *In re Evans, supra,* is inescapable. The license to practice law generally, or the right to practice before a particular court of the United States after meeting all of the formal prerequisites is in the nature of a property interest [illegible] deprivation of which has drastic consequences [illegible] individual. Fairness and justice require that no person be subject to divestment of such an interest without being afforded substantial due process. *In re Ming,* 469 F.2d 1352, 1355 (7th Cir. 1972).

Although the denial of admission to appear *pro hac vice* may not perhaps impose the same drastic divestment as exclusion from a state bar entirely, it is nevertheless true, and certainly not to be disputed here, that the value to an attorney of appearing before a federal court is *not* de minimis. And, in the words of this Court, "as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." *Goss v. Lopez,* 419 U.S. 565, 576 (1975).

It is to be noted, moreover, that by summarily denying Mr. Belli admission *pro hac vice,* despite his having met all of the formal prerequisites of admission, the trial court improperly imputed to him professional and ethical misconduct. This totally unmerited imputation,[1] which Mr. Belli was given no opportunity to refute, attaches to him a "badge of infamy"—a moral stigma. In fact and law Mr. Belli was cleared by the California Bar to whom Judge Sirica sent his resolution. Notions of due process require that Mr. Belli be given an opportunity to remove this "badge" and vindicate his honor. Thus, this Court has held:

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. . . . [o]nly when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented. *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971).

---

[1] Although not conclusive, admission to a state bar raises the presumption that an attorney has met both professional and ethical qualifications necessary to practice before a federal court. *See In re Ruffalo, supra,* 390 U.S. at 547.

In the case at bar, Judge Gasch imposed upon Mr. Belli a punishment and a "badge of infamy" without affording him a fair hearing or a fair opportunity to erase the undeserved stain upon his reputation. As a result, he has been denied the opportunity to devote his vast experience to the cause of Petitioners herein, two young black girls involuntarily sterilized through the misuse of government funds. Petitioners urge that the facts of the instant case compel the issuance of such a Writ of Certiorari to correct this denial of due process.

3. The trial court's decision was arbitrary, capricious and unreasonable.

No federal reviewing court has ever sustained, or suggested that it would sustain, a denial of admission *pro hac vice* where the applicant was a member in good standing of his home state's bar, had complied with all formal requirements set forth in the applicable local rule of court, had not engaged in "unlawyerlike conduct" in connection with the case in which he wished to appear, and had not been found guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court.

Indeed, the most recent case of *In re Evans, supra,* forthrightly supports the position that for purposes of admission to practice in federal court, the basic determinant of both professional and ethical qualifications is admission to a state bar. There the Fifth Circuit held:

> Admission to a state bar creates a presumption of good moral character that cannot be overcome merely by the whim of the District Court. An applicant for admission *pro hac vice* who is a member in good standing of a state bar may not be denied the privilege to appear except "on a showing that in any legal matter, whether before the particular district court or in another jurisdiction, he has been guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court." 524 F.2d at 1007.

This holding is consistent with the principle that a litigant is entitled, wherever possible, to be represented by counsel of his choice. *Sanders v. Russell,* 401 F.2d 241, 246 (5th Cir. 1968). And a court is without discretion to deprive a party of this important choice by denying admission *pro hac vice* in instances where counsel has complied with all formal prerequisites of admission and been guilty of no "unlawyerlike conduct" in connection with the case in which he wishes to appear. Mandamus will lie to compel the court to perform its ministerial functions in this respect. *See Munoz v. United States District Court for the Central District of California,* 446 F.2d 434 (9th Cir. 1971).

It is true that the Court of Appeals for the Fourth Circuit in *Thomas v. Cassidy,* 249 F.2d 21 (1957), *cert. denied,* 355 U.S. 958 (1958), held that the granting of permission to a non-resident attorney to practice *pro hac vice* was a matter of "grace" resting in the

sound discretion of the judge.[a] The court in *Thomas*, however, specifically found that "unlawyerlike conduct" of plaintiff's counsel *in the same case in which he wished to appear pro hac vice*, and for which the court had denied him admission, was supported by the findings and was therefore not an abuse of discretion. 249 F.2d at 92.

The courts have distinguished *Thomas* on this basis and have granted admission *pro hac vice* absent a showing of "unlawyerlike conduct in connection with the case in which [the non-resident attorney] wished to appear." *Spanos v. Skouras Theatres Corp.*, 235 F. Supp. 1, 11 (S.D.N.Y. 1964); *see also, Gerecht v. American Insurance Co.*, 344 F. Supp. 1056, 1063 (W.D. Mo. 1971); *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, 578 (D. Minn. 1968).

Thus, the prerogative of a trial judge to exclude out-of-state counsel is not an absolute right. *Ross v. Reda*, 510 F.2d 1172, 1173 (6th Cir. 1975). Discretion

[a]The use of the word "grace" is misleading. Petitioners are children who have been cruelly injured. They do not request that a court bestow "grace" upon them, but only that the court secure justice for them. A court is not a cathedral. Discretion can never be a matter of "grace", for it is always a matter of duty. Bruised feelings, tender sensitivities, or injured pride cannot withstand the power of law and the compulsion of a judge's duty. The words of Chief Justice Marshall are particularly apt in this respect:

> Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the *duty* of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law. *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824) (emphasis added).

to exclude has arisen *only* when an applicant has engaged in, or would potentially engage in, unprofessional or unethical conduct in relation to the case for which admission *pro hac vice* is sought. *See Atchison, Topeka and Santa Fe Railway Co. v. Jackson*, 235 F.2d 390, 392-93 (10th Cir. 1956); *Reda, supra*, 510 F.2d at 1173.

The rationale here is clear. Unless the "unlawyerlike conduct" arises during the course of litigating the suit, the trial judge has no adequate basis upon which to exercise his discretion to deny admission. To the contrary, the applicant, if in fact a member in good standing of a state bar, is presumed to have met both professional and ethical qualifications necessary to practice before a federal court. *See In re Ruffalo, supra*, 390 U.S. at 547. Only after an appropriate hearing at which the applicant has been found guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court may a trial court exercise its discretion to deny admission *pro hac vice*. *In re Evans, supra*, 524 F.2d at 1008.

It bears repeating that Mr. Belli has asserted before the District Court and the Court of Appeals for the District of Columbia that he is a member in good standing of the California Bar, that he has joined of record a member of the District of Columbia bar in the case in which he desires and deserves to appear and otherwise complied fully with the applicable local rule, that he has not been accused or found guilty of any improper or unlawyerlike conduct in relation

to the case in which he now wishes to appear *pro hac vice,* and that he has not been found guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court. In fact, when finally afforded a full and fair hearing, he was conclusively exonerated of all charges of such wrongdoing. Petitioners reassert that under these circumstances no authority exists in law or policy for the notion that a trial court may exercise its discretion to deny Mr. Belli's admission *pro hac vice.*

It is therefore clear from the record that the trial court plainly abused its discretion by summarily denying Petitioners' application after refusing to hear any arguments in its support. In so doing, the trial court disregarded pertinent facts and conclusions of law. Action of this nature is unreasonable, arbitrary or fanciful, and therefore an abuse of discretion. *United States v. McWilliams,* 82 U.S. App. D.C. 259, 163 F.2d 695, 697 (D.C. Cir. 1947).

Where, as here, the record reveals absolutely nothing which would disqualify an applicant from admission *pro hac vice,* a trial court *must* grant admission or be compelled to do so upon its refusal.

The District Court has refused the admission of Melvin M. Belli *pro hac vice* and has refused to accept a written motion and order on his behalf; and the Court of Appeals, in denying the Petition for Writ of Mandamus, has refused to correct the trial court's error. The Writ of Certiorari should be granted to correct the summary and unconstitutional

denial of Mr. Belli's application to appear *pro hac vice* and of his terribly injured clients' right to be represented in this matter of grave importance by the counsel of their choice.

B. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO WHETHER SUMMARY DISPOSITION OF AN APPLICATION TO APPEAR PRO HAC VICE IS CONSISTENT WITH DUE PROCESS.

Two Courts of Appeals have considered the standard which obtains in denying an application to appear *pro hac vice.* The Fifth Circuit, in *In re Evans, supra,* held that an applicant who demonstrates good standing in a state bar may not be denied permission to appear without being informed of specific instances of the unethical or offensive behavior with which he is charged and without being afforded a hearing on the record in which he has adequate opportunity to defend himself from the charges. In so holding, the court recognized that the arbitrary and capricious exercise of discretion by a trial court does not comport with standards of fairness and due process.

By contrast, in an earlier *per curiam* decision, the Fourth Circuit termed admission *pro hac vice* "a privilege, the granting of which is a matter of grace." *Thomas v. Cassidy, supra,* 249 F.2d at 92.

In rejecting Mr. Belli's application, the District Court failed to indicate which standard it deemed applicable. *In re Relf, supra,* No. 76-2073 (Leventhal, C. J., dissenting). It is to be presumed from its summary disposition of the matter that the Court by implication adopted the Fourth Circuit position.

In view of the standards of due process made applicable to attorneys by this Court in cases involving admission to practice and disciplinary matters (see cases cited *supra* at A.2), an evidentiary hearing as required by *In re Evans, supra,* is compelled by the Constitution.

The conflict thus arising among the Circuits concerning whether to afford the constitutional safeguard of due process to attorneys practicing before the Federal Bench is disturbing and serious. This conflict justifies granting a Writ of Certiorari to review the judgment below.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated, May 25, 1977.

(Appendices Follow)

APPENDICES

Appendix "A"

United States Court of Appeals for the
District of Columbia Circuit

September Term, 1976

No. 76-2073

In re: Mary Alice Relf, Minnie Relf and Katie Relf, by and through their next friend, Lonnie Relf, Petitioners.	Civil Action 74-224

[Filed Mar. 3, 1977]

Before: Tamm, Leventhal and Robb, Circuit Judges

ORDER

On consideration of petitioners' petition for writ of mandamus and supplemental brief in support thereof, it is

ORDERED by the Court that the petition is denied.

Per Curiam

Circuit Judge Leventhal dissents for the reasons set forth in the attached memorandum.

MEMORANDUM

Leventhal, Circuit Judge, dissenting: I would request responses pursuant to F.R.A.P. 21(b). The District Judge did not give reasons at this time for his denial of the motion to appear *pro hac vice* but stated that it was a matter on which he had already ruled. The District Judge had written an opinion in support of a ruling denying a previous motion to permit a *pro hac vice* appearance involving the same attorney but a different case. *In re Belli,* 371 F.Supp 111 (D.D.C. 1974). In the 1974 opinion the District Judge said that the applicable test is stated in *Thomas v. Cassidy,* 249 F.2d 91 (4th Cir. 1957), *cert. denied,* 355 U.S. 958 (1958). In the *Cassidy* case the court said that appearing *pro hac vice* was not a right but a privilege, "a matter of grace resting in the sound discretion of the presiding judge," and could be denied for "unlawyerlike conduct." In the case of applicant Belli, the District Judge stated that an appearance *pro hac vice* could be denied for statements, casting doubt on the integrity of a judge, that were "recklessly made . . . in complete disregard as to the factual accuracy of his statements."

This seems to be a matter on which there is a conflict of circuits, with *In re Evans,* 524 F.2d 1004 (5th Cir. 1975). *Evans* requires that an application for admission *pro hac vice* be granted unless there is a showing that the applicant "has been guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court." Under *Evans,* a trial court with evi-

dence of misconduct must give the attorney adequate notice of the specific allegations against him, hold a hearing on the record and provide the attorney with an opportunity to defend himself and his reputation.

In this posture of the matter, I do not believe summary disposition is appropriate. The Court of Appeals should determine on the merits what it considers the sound standard. Mandamus is the appropriate procedure for raising this question. *In re Evans, supra; Thomas v. Cassidy, supra.*

An additional reason for requesting responses is the presence of the applicant's First Amendment contentions. The same statements that prompted the District Judge to deny the *pro hac vice* motion in *In re Belli* were the subject of disciplinary proceedings in California. Following a three-day adversary hearing, the Local Administrative Committee for the State Bar of California, District 4, concluded that Belli's statements were made with neither actual malice nor gross negligence. Applying the standards of *New York Times v. Sullivan,* 376 U.S. 254 (1964), the Committee held that Belli could not be disciplined consistent with the Constitution. *In the Matter of Belli,* No. S.F. 2247 (October 6, 1975).

Of course, the District Judge's finding that Belli's statements were "recklessly made . . . in complete disregard as to the factual accuracy of his statements" is in apparent conflict with the conclusion of the State Bar Committee. However, the District Judge's opinion does not state that the standards of *New York Times v. Sullivan* were being applied. Absent some

clear indication, I am reluctant to conclude that the District Judge ruled on the question whether Belli's remarks are protected by the First Amendment. In any event, it does not appear that the District Judge held an adversary hearing on the matter.

In my opinion, we should request responses to assist the Court in determining the standard applied by the District Judge and, if the case is not appropriate for summary affirmance by this Court, should arrange for plenary review of the issue on the merits, on the application for mandamus.

It may be obvious but to avoid any possible misunderstanding I close by saying that this opinion does not mean that I have concluded that Mr. Belli is entitled to enter a *pro hac vice* appearance, nor does it foreshadow what standard or procedure I think is appropriate, but only that the matter warrants a deliberative ruling after opportunity to make a full submission on the issue. Finally, whatever the merits of this petition, the issue is completely separate and apart from the issue of the control that the trial judge may properly exercise in his courtroom in the face of improper or untoward actions or omissions by counsel. The discretion and authority of the trial judge in that regard applies whether the counsel involved is a member of the bar of the court or has entered an appearance *pro hac vice.*

Appendix "B"

In the United States District Court
For the District of Columbia

Relf,	Plaintiffs,	Civil Action No. 74-224
vs.		
U.S.A.,	Defendant.	

EXCERPT OF PROCEEDINGS
Washington, D.C.
November 8, 1976

The above-styled matter came on for hearing in open Court at 2:00 o'clock, P.M., before:

The Honorable Oliver Gasch
United States District Judge

Appearances:

On behalf of the Plaintiff:
Kent A. Russell, Esquire
Henry Weil, Esquire

On behalf of the Defendant:
Donald Jose, Esquire
Neil Peterson, Esquire.

Regis Griffey
Official Court Reporter

EXCERPT OF PROCEEDINGS

• • • • • • •

Mr. Weil: Good afternoon, Your Honor. I am Henry Weil, local counsel in the case for the Plaintiff.

I would like to introduce this afternoon to Your Honor Kent Russell whose appearance has previously been entered in the case from the California Bar.

At this time, also, Your Honor, preliminarily, I'd like to file with the Court to admit as co-counsel along with Mr. Russell for purposes of trial, the admission pro hac vice of Melvin M. Belli.

The Court: The Court has ruled on Mr. Belli's status. That will be denied. I will admit Mr. Russell pro hac vice to argue this motion.

Mr. Weil: Would Your Honor want to accept the papers for filing?

The Court: The Court has ruled on Mr. Belli's proposal.

Mr. Weil: Thank you.

• • • • • • •

Certified: /s/ Regis Griffey, Official Reporter

Appendix "C"

The State Bar of California
Before Local Administrative Committee
For State Bar District 4

No. S.F. 2247

In the Matter of
Melvin Mouron Belli,
A member of the State Bar.

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATIONS

The above-entitled proceedings came on regularly for hearing on the merits before this Committee on August 5, 6 and 7, 1975. Present at the hearing were John E. Troxel, Chairman, Stephen M. Tennis and William S. Mailliard, Jr., Members of the Committee, Michael J. Conklin and John G. Schwartz, Examiner and Co-Examiner respectively, Melvin Mouron Belli, Respondent and Kent A. Russell and Sydney Irmas, Jr., Counsel for Respondent. The hearings on the merits were reported by Richard S. Adams of Schiller & Combs.

The Respondent filed an Answer and an Amended Answer to the Order to Show Cause, and the matter was at issue on the Notice and the Amended Answer.

After full consideration of the evidence adduced, the Committee makes its Findings of Fact and Conclusions as follows:

Respondent, Melvin Mouron Belli, is now, and at all times since November 15, 1933, has been, a Member of the State Bar of California.

Count One

I.

On or about May 14, 1973, the Respondent appeared on the Merv Griffin television program and participated in a nationwide broadcast. A somewhat inaccurate transcript of that show and an audio tape of the show were admitted as State Bar Exhibit I and contain, *inter alia,* the remarks set forth in Paragraph III(a) through (f) of the Notice to Show Cause.

II.

Respondent's remarks hereinabove referred to, made reference to the civil suit in the United States District Court for the District of Columbia, entitled, "*Charlene Morris, et al. v. Children's Hospital,* Civil Action No. 575-71" and to the Honorable John Lewis Smith, Jr., who presided at the trial of said lawsuit.

III.

Respondent's remarks made to Merv Griffin, before a nationwide television audience, as set forth in the transcript (Exhibit I) were:

> "I had one in Washington, D.C., the other day where the judge turned out to have the lawyer

> who represents all of the hospitals in the district and we were suing the hospitals. It was his son and he was living with him. Listen, the Judge sitting in on this case was excused from a similar type of case just before and told not to sit. He sat on our case and we didn't know anything about this . . . And there wasn't a word in that case to say this publicly. I say this publicly because they are true and I think they should be corrected.
>
> "Let me just finish this one thing. Here's this little girl . . . she was a black girl and Washington verdicts are low. We tried this case before a black jury. There was 64 veniremen—people from whom you choose your jurors. Sixty-four. Sixty of them were all black. And here was a wonderful thing to see. Here in Washington, where they couldn't sit on the same side of the courtroom ten years ago. Now, we're dependent upon the blacks there to give us justice. And they give good justice. They're very intelligent, very patient. They're wonderful jurors. They came in with an award for this little blind girl against the hospitals. They were giving this little girl dilantin. She got Stephen's-Johnson syndrome, which means she got untoward effects from taking too much dilantin. She became blind. She's fifteen. Beautiful tall little girl. They took her before that jury and the jury awarded $900,000. Two weeks later, this judge set it aside and said we're going to set the jury verdict aside. Some of the jurors called us just on their own motion, and they were really shocked about this. I think that judge was wrong in sitting on that case when he knew that he had been excused from similar cases against a similar defendant and

then having his son representing the Medical Association of the District of Columbia and living with him.

"We didn't know about that until after he had decided that the verdict should be set aside. The $900,000 to the little girl. Now we have made motions, and I can mention this, too, because there was a big story in the *Washington Post* on that just the other day. That's not right to have a thing like that.

"But it's rare that those things happen. Most of our . . . ninety-nine and nine-tenths of our judges advisedly are not only learned but are good, and things like this don't happen . . . when they do happen, they shock me and I think they shock all of us."

IV.

Some of the remarks made on the Merv Griffin Show were not true or were only partially true, as follows:

(a) Judge Smith's son represented the District of Columbia Medical Society, not all of the hospitals in the District (as correctly stated in the latter part of Respondent's remarks).

(b) No evidence was introduced affirmatively showing that Judge Smith had ever been told not to sit in similar cases (although he had recused himself in other medical malpractice cases).

(c) Washington, D.C. courtrooms were not segregated at the time stated by Respondent.

(d) Judge Smith's son was not living with Judge Smith (however, the Washington, D.C., telephone directory indicated that he was).

V.

Both the State Bar and Respondent agree that this matter is governed by the standards set forth in *New York Times v. Sullivan*, 376 U.S. 254, 11 L.E.2d 686, 86 S.Ct. 710 (1964). The Committee agrees. Applying the *Times* standard to this case, Respondent cannot be subject to disciplinary action for his remarks unless the State Bar establishes by clear and convincing evidence that Respondent's remarks were made with "actual malice"—*i.e.*, that they were made with knowledge of their falsity or with reckless disregard of whether they were false or not. The State Bar also asserts that discipline may be imposed for "grossly negligent" remarks. The Committee is unsure whether the State Bar is asserting a standard less than recklessness or whether it is simply restating the *Times* standard. However, for the reasons set forth below, the distinction between the two standards, if any, is immaterial to the outcome of this matter.

The State Bar did introduce evidence in support of its allegation of malice or gross negligence. The evidence did establish that the trial judge had given Respondent a "bad time" during the trial, had failed to disclose his son's relationship with the medical association, and had set aside a verdict for Respondent's client, which at that time was the largest malpractice judgment ever awarded in the District of Columbia. Respondent volunteered his remarks on a nationwide television show shortly after the events referred to; they were not made in response to any particular question by other members of the show.

Respondent testified that he had been ill at the end of the trial and had not participated directly in some of the events forming the basis of his remarks. His information concerning those events was obtained from the affidavit of the plaintiff, from conversations with other attorneys, an investigator, from a newspaper article, and, with regard to segregation in the District of Columbia courtrooms, on his own recollection of the facts. He denied any intention to impugn the trial judge or the courts, and stated that he believed his remarks to be true. In addition, as noted above, the District of Columbia telephone book disclosed a listing for the judge's son at the judge's residence.

Based upon the foregoing, the Committee finds that, to the extent Respondent's remarks were untrue or only partially true, the State Bar failed to establish by clear and convincing evidence that the remarks made by Respondent were made with malice—*i.e.*, that they were made with knowledge of their falsity or with disregard of whether they were false or not. In addition, the State Bar failed to establish by clear and convincing evidence that Respondent was grossly negligent in making those remarks.

Count Two

I.

On or about January 17, 1972, Respondent appeared on the Phil Donahue Television Show and participated in a television broadcast by Station WLWD, Dayton, Ohio, wherein Respondent made certain

remarks, a partial transcript of which was admitted in evidence as State Bar's Exhibit II.

II.

Respondent's remarks made reference to a civil suit started in the Court of Common Pleas, in Lucas County, Ohio, entitled *William Driscoll v. Paul Block, Jr., et al.,* No. 199 2334, the various appeals in that case, and to Honorable Kingsley A. Taft, the then Chief of Justice of the Ohio State Supreme Court.

III.

Respondent stated to the television audience, in response to a question by Mr. Donahue:

> "Oh, yeah. $365,000 for Judge Driscoll, one of our best judges—up there in Toledo—and we had this warrant against Paul Block of the *Toledo Blade*——
>
> "We lost on appeal. I remember the night before the case was argued in the Supreme Court. The Chief Justice . . . has his arm around the publisher of the newspaper giving him an award for good journalism. This is fact.
>
> "No, I won. We were robbed upstairs, but we won downstairs. . . .
>
> "I'm not upset. I just think that Judge Bill Driscoll was robbed upstairs in your Supreme Court, and I think the opinion was a lousy opinion, and I think any lawyer that reads the trial record will agree with me. I don't think the Chief Justice should have been giving the defendant, the night before he heard this argument in the Supreme Court, an award for good journal-

ism when I had sued that editor and had collected, at least up until then, $365,000 against him. That isn't good appellate practice in my book. I'll say that to the Justice.

"You think that's right? Here's a judge that I'm going before in the Supreme Court, and he's gonna decide this case—and . . . the night before, he's got his arm around the defendant giving him an award for good journalism? And we have just sued him and collected $365,000? Wouldn't that make you just a little concerned? That this judge may have prejudged the case? Yes sir, it would me. And it did. And he had."

IV.

Some of Respondent's remarks were not true:

(a) The evidence indicates that the award presentation was a year preceding the date the case was argued before the Supreme Court, not the night before.

(b) The photographic evidence does not show the Chief Justice with his arm around Paul Block (although photographs did show them standing in close proximity to each other).

(c) The Court of Appeals reversed the verdict in favor of Respondent's client. The Supreme Court only denied a Petition for Certiorari.

V.

The State Bar failed to introduce any evidence relating directly to Respondent's state of mind at the time he made the remarks on the Phil Donahue show. Since Respondent's remarks were made five

and a half years after the trial, were made spontaneously in response to a "lead-in" by the moderator and were made in part relying on what Respondent's client, Judge Driscoll, told Respondent, the Committee declines to infer from the falsity of the remarks that they were made with malice (*i.e.*, that they were made with knowledge of their falsity or with reckless disregard of whether they were false or not) or that Respondent was grossly negligent in making those remarks. Accordingly, the State Bar has failed to meet its burden of establishing by clear and convincing evidence that Respondent's remarks were made with malice, or with gross negligence.

Conclusions

From the foregoing Findings of Fact, the Committee concludes:

As to both Counts I and II, the State Bar failed to meet its burden of establishing by clear and convincing evidence malice or gross negligence on the part of Respondent in making the statements which the Committee found either to be untrue or to be "half-true."

Recommendations

The Committee believes that the Respondent made injudicious statements to what was known to Respondent to be substantial audiences, but that the State Bar failed to prove "actual malice" as required by the United States Supreme Court in *New York Times Co. v. Sullivan.* Nor did the State Bar establish that those statements were made with gross

negligence. The Committee, therefore, recommends that the proceedings against Respondent be dismissed.

Dated: October 6, 1975.

John E. Troxel, Esq., Chairman
Local Administrative Committee
for State Bar District 4

Stephen M. Tennis, Esq., Member

William S. Mailliard, Esq., Member

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1680

MARY ALICE RELF, MINNIE RELF
and KATIE RELF, by and through
their next friend, LONNIE RELF,
Petitioners.

v.

THE HON. OLIVER GASCH, JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The court of appeals rendered no opinion. The order denying the petition for writ of mandamus, and the memorandum of Judge Leventhal, dissenting, are printed in the petition (Pet. App. A).

JURISDICTION

The judgment of the court of appeals (Pet. App. A, at i) was entered on March 3, 1977, and the petition for writ of

certiorari was filed on May 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial judge acted within his discretion in denying a nonresident attorney permission to participate *pro hac vice* in the trial of a case, based on his determination that the attorney, in connection with another case in which he had been granted permission to participate *pro hac vice*, had made false statements on national television calculated to prejudice the standing of the Court and to impugn the integrity of one of its judges.

STATEMENT

The Rules of the United States District Court for the District of Columbia provide that an attorney who is not a member of the bar of that court or who does not maintain an office in the District of Columbia may enter his appearance and file pleadings provided he joins of record a resident attorney who does maintain an office in the District, but in order to "be heard in open court" such an attorney "must in addition secure the permission of the trial judge."[1] Melvin M. Belli was denied such permission by the respondent, Hon. Oliver Gasch, United States District Judge for the District of Columbia, to appear on behalf of the petitioners in a Tort Claims Act lawsuit in which they were the plaintiffs. The petitioners seek a writ of certiorari to review the denial by the court of appeals of

[1]Rule 1-4(a)(2). The full text of the rule is as follows: "An attorney who is a member in good standing of the bar of any United States Court or of the highest court of any State but who does not qualify under the requirements of subsection (1) above may enter an appearance, and file pleadings in this court, provided that such attorney joins of record a member of the bar of this court who does meet the requirements of subsection (1) and who will at all times be prepared to go forward with the case. If such an attorney wishes to be heard in open court, he must in addition secure the permission of the trial judge."

their petition for mandamus to direct the admission *pro hac vice* of Mr. Belli.

Mr. Belli, a resident of California and member of that State's bar, requested and received permission to participate in the 1973 trial of a medical malpractice case[2] before the Hon. John Lewis Smith, Jr., of the United States District Court for the District of Columbia. The jury in that case returned a verdict of $900,000 in favor of Mr. Belli's client, but on April 18, 1973, Judge Smith granted the defendant's motion for a new trial on the ground that repeated references by Mr. Belli to insurance before the jury had so prejudiced the defendant that a new trial was necessary.

Less than a month after Judge Smith's ruling, Mr. Belli appeared on the "Merv Griffin Show," a nationally televised interview program. In the course of discussing an unrelated case which Mr. Belli said he believed he had lost because of "the friendship of the judge for the defendant,"[3] Mr. Belli stated:

> "Sometimes that happens. I had one in Washington, D.C. the other day, where the judge turns out to have the lawyer who represents all of the hospitals in the District, and we were suing the hospitals. It was his son and he was living with him. And this judge sitting on this case was excused from a similar type of case just before and told not to sit. And he sat on my case, and we didn't know anything about this. . . ."

Later in his discourse, Mr. Belli commented that both his client and the jury had been black, and that blacks in the District of Columbia "couldn't sit in the same side of the courtroom ten years ago." He stated that he thought "the

[2]*Morris v. Children's Hospital*, Civil No. 575-71 (D.D.C.).

[3]The full text of Mr. Belli's remarks is set forth in *In re Belli*, 371 F. Supp. 111, 112 n.6 (D.D.C. 1974).

judge was wrong in sitting on that case," and concluded:

> "But it's rare that those things happen. Most of our . . . Ninety-nine and nine-tenths of our judges advisedly are not only learned but are good, and things like this don't happen . . . and when they do happen, they shock me and I think they shock all of us."

On June 22, 1973, at their regular monthly executive session, the judges of the District Court unanimously adopted a resolution[4] noting Mr. Belli's televised remarks, finding those remarks to be "grossly inaccurate in important respects" and expressing the opinion of the judges that Mr. Belli had violated its rules of free press and fair trial as well as the Code of Professional Ethics. Because the court's own disciplinary Committee lacked authority to proceed except against members of the bar of the court, the resolution authorized the Chief Judge to forward the matter to the disciplinary committee of the State Bar of California for such disciplinary action as it found appropriate.

Following these events, Judge Smith recused himself from the *Morris* case on motion of the plaintiff, and the case was reassigned to the respondent, the Hon. Oliver Gasch. Prior to the retrial, Mr. Belli again moved to participate *pro hac vice* in that case. Judge Gasch, at the request of moving counsel, conducted an *in camera* hearing on this motion. At the hearing, Mr. Belli was permitted to, and did, address himself to the question of the propriety of his statements on the "Merv Griffin Show." Regarding this hearing, the petitioners erroneously state (Pet. 7-8) that it was a "thoroughly unexpected *in camera* proceeding;" that the Court did not "make any record" of the proceeding; and that Mr. Belli "had neither the requisite notice to enable him to prepare to meet the false charges hurled against him nor the opportunity to dispute the factually

[4]The resolution, which is characterized but not reproduced in the petition for certiorari, is attached as Appendix A to this brief.

inaccurate statements which the Court attributed to him." The facts, however, are as follows: (1) the hearing *was* recorded, and a transcript prepared;[5] (2) the hearing was conducted *in camera* at the *specific request of counsel* moving Mr. Belli's admission, and its subject matter was fully anticipated by Mr. Belli;[6] (3) the record reflects that, in fact, no "false charges" were "hurled" at Mr. Belli; and (4) Mr. Belli was afforded a full opportunity, indeed was invited, to "dispute" the statements that had been attributed to him, yet he did not suggest that the account of those statements was in any way "factually inaccurate."

[5]The transcript was filed in the record of the *Morris* case on January 17, 1975. The petitioners did not include the transcript in the record before the court of appeals, and as the petition for mandamus was decided without requesting a response by the district judge, it was apparently not brought to the attention of that court. In view of the factual allegations made in the petition for certiorari regarding the hearing, respondent has lodged with the Clerk of this Court a full copy of the transcript.

[6]The transcript reflects, at pp. 2-3, the following:

> [By Mr. Scherr]:
>
> . . . The reason why I asked for this bench conference is to ask whether or not it might be possible for us to take up this matter concerning Mr. Belli's practicing in the case in chambers, either recorded or unrecorded, at Your Honor's pleasure in this kind of situation.
>
> THE COURT: It would be recorded, Mr. Scherr. I would not feel confident without recording it.
>
> MR. SCHERR: I think this is the kind of situation where the formality of the courtroom may well inhibit. A more conducive atmosphere, if Your Honor sees fit, for us to go into your chambers and perhaps discuss it and come to a conclusion at that time.
>
> I discussed it with Mr. Kelp, and I discussed it with Mr. Belli, and it is a joint request of counsel on the part of the plaintiff to do it in this manner.

On February 6, 1974, Judge Gasch entered a memorandum opinion denying the motion for Mr. Belli to participate in the *Morris* case and fully explaining his reasons. The court noted that the motion was one addressed to its sound discretion, and framed the question as "whether the remarks and conduct of Mr. Belli were so impermissible as to warrant the denial of his motion for admission pro hac vice." The opinion then reviewed the remarks made in the televised broadcast, and determined each of the most significant of Mr. Belli's allegations to have been false; Judge Smith's son did not represent hospitals in the District, he did not reside with Judge Smith, and Judge Smith, while he had voluntarily recused himself in an earlier malpractice case, had not been ordered not to sit on the case. Furthermore, the courtrooms of the district court were not segregated ten years earlier, or even forty years earlier. Judge Gasch concluded that Mr. Belli had "acted in complete disregard as to the factual accuracy of his statements," and that the statements "were calculated to prejudice the standing of this Court and to cast a shadow upon its integrity and that of one of its judges. . . ." 371 F. Supp. at 113-114.

Mr. Belli did not seek review of that order, nor did he seek review when another judge of the district court, in *Davis v. United States*, Civ. No. 75-0843 (D.D.C. March 8, 1976), denied a similar application for permission to participate in another medical malpractice case after hearing counsel *in camera*.

In the meantime, the Bar of the State of California instituted disciplinary proceedings against Mr. Belli based upon the complaint forwarded by the Chief Judge of the district court below, and on a similar complaint concerning false charges made by Mr. Belli on a television program against the Chief Justice of the Ohio Supreme Court.[7] The

[7]In that incident, according to the opinion of the Administrative Committee of the State Bar (Pet. App. vii-xvi), Mr. Belli implied that (continued)

hearing committee of the State Bar conducted hearings in August 1975, and entered written findings and conclusions (Pet. App. vii-xvi) recommending that the proceedings be dismissed. The committee found that Mr. Belli "made injudicious statements to what was known to [him] to be substantial audiences," but that the State Bar had failed to prove "by clear and convincing evidence" that the statements were made with "actual malice" or with "gross negligence," standards which the Committee felt were necessitated by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).[8]

The petitioners herein filed suit against the United States and certain federal officers on February 4, 1974, seeking damages on the ground that the minor females had been subjected to sterilization procedures without the informed consent of their parents. On November 8, 1976, at a hearing on the defendants' motion for summary judgment, local counsel for the petitioners offered a motion to admit Mr. Belli — who was not present in the courtroom — *pro hac vice* as additional counsel "for purposes of trial." The Court orally denied the motion on the ground of its previous ruling in the *Morris* case. (Pet. App. at v-vi.) Sum-

[7](continued)
the Ohio Supreme Court had reversed a $365,000 verdict in favor of his client in a libel case, and stated that the Chief Justice had "prejudged" the case because "the night before the case was argued in the Supreme Court," the Chief Justice "had his arm around the publisher giving him an award for good journalism." In fact, (1) the court of appeals had reversed the award, and the Supreme Court only denied a petition for certiorari; (2) the journalism award occurred a year before the case was argued in the Supreme Court; and (3) there was no evidence that the Chief Justice had his arm around the publisher at the presentation.

[8]Petitioners assert (Pet. at 8) that "the Committee found that the statements made by Mr. Belli, though factually incorrect in certain minor respects, were substantially true," and that the Committee found "there was *no* proof that the incidental remarks at issue which were inaccurate had been made recklessly or with gross negligence or with any knowledge of their falsity." (Emphasis in original.) The Committee's opinion does not support either of these statements.

mary judgment was subsequently granted for the defendants, and the petitioners' complaint was dismissed. *Relf v. United States*, Civ. No. 74-224 (D.D.C. Jan. 29, 1977).

On December 1, 1976, the petitioners filed in the court of appeals a petition for writ of mandamus directing Judge Gasch to admit Mr. Belli *pro hac vice*. On the basis of the petition and a supplemental brief filed by the petitioners, the court of appeals denied the petition on March 3, 1977. Judge Leventhal filed a dissenting memorandum, expressing no view of the merits but stating that he would have requested a response to the petition pursuant to Rule 21(b), Federal Rules of Appellate Procedure, rather than denying the petition summarily.

ARGUMENT

1. Denial of the motion to admit Mr. Belli *pro hac vice* did not infringe his First Amendment rights.[9] In the first place, this Court has never held that the standards of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), override the ethical obligations of attorneys to refrain from unjust or intemperate attacks on the integrity of judges before whom they practice. Second, even if the standards of *New York Times Co. v. Sullivan* were held to limit the discretion of a trial judge to decide whether a non-member of the Court's bar should be permitted to try a case before him, the basis for the respondent's action in this case is fully consistent with those standards.

More than a hundred years ago this Court observed, in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 355 (1872):

[9]Mr. Belli is not himself a petitioner in this Court, and there is a serious question whether his First Amendment rights may be asserted by the petitioners. In a similar situation, the Second Circuit assumed without deciding that such asserted rights of an attorney could be raised by the client. *In re Rappaport*, ____ F.2d ____, 46 U.S.L.W. 2003 (CA 2 June 14, 1977).

> "[T] he obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the Bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts."

This principle was embodied in Canon 1 of the ABA Canons of Professional Ethics,[10] and is carried over in Canon 8, EC 8-6 of the Code of Professional Responsibility.[11] Professional discipline as well as judgments of contempt have been upheld for violation of this duty, where accusations were made in pleadings as well as to the press. *E.g., Spencer v. Dixon*, 290 F. Supp. 531 (W.D. La. 1968);

[10]"It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected."

[11]"EC 8-6 provides, in part:

> "Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified."

In re Chopak, 66 F. Supp. 265 (E.D.N.Y. 1946); *In re Philbrook*, 105 Cal. 471, 38 P. 884 (1895); *In re Raggio*, 487 P.2d 499 (Nev. 1971); *In re Meeker*, 76 N. M. 354, 414 P.2d 862 (1966), *appeal dismissed*, 385 U.S. 449 (1967); *In re Thatcher*, 90 Ohio St. 492, 89 N.E. 39 (1909); *State ex rel. Dabney v. Breckenridge*, 126 Okla. 86, 258 P. 744 (1927); *State Bar Comm'n ex rel. Williams v. Sullivan*, 35 Okla. 745, 131 P. 703 (1912), *Re Troy*, 43 R.I. 279, 111 A. 723 (1920); *In re Egan*, 24 S.D. 301, 123 N.W. 478 (1909).

Nothing in *New York Times Co. v. Sullivan* or its progeny suggests that the courts and the legal profession are constitutionally prohibited from imposing upon lawyers in this regard any higher standard than that they refrain from accusations made with malice. As explained by the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974), the *New York Times* standard represents an "accommodation" between the need to foster a vigorous and uninhibited press and the "limited state interest present in the context of libel actions brought by public persons." It does not, as the petitioner argues, define constitutionally protected speech for all purposes, but rather defines a burden of proof and standard of care in a context that poses peculiarly acute dangers of inhibiting freedom of the press. When the context is not that of a libel suit, but rather the regulation by the courts of the conduct of attorneys permitted to practice before them, the "accommodation" struck in *New York Times v. Sullivan* is inappropriate. *Cf. In re Sawyer*, 360 U.S. 622, 646-647 (1959) (Stewart, J., concurring): "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."

In the criminal context, this Court has made it clear that the *New York Times* rule does not bar a court from imposing restraints on lawyers' speech, or from sanctioning attorneys for statements that would not justify criminal prosecution or support a libel verdict in favor of a public

figure. In *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), for example, the Court counseled trial courts to "take such steps by rule and regulation that will protect their processes from prejudicial outside interferences," including restrictions on comments by counsel. Collaboration between attorneys and the press as to information affecting the fairness of a trial, the Court wrote, "is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 601 & n.27 (1976) (Brennan, J., concurring).

The inapplicability of the *New York Times* standard to speech in other specialized contexts is similarly well settled. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969), for example, the Court expressly declined to apply *New York Times* to an employer's claim of freedom of speech in talking to his employees about the consequences of union representation. An employer's comments to his employees are sufficiently different from a newspaper's comments about a public official, the Court wrote, to justify a far greater restriction on speech in the former context. As to the employer's claim that the NLRB's line between permitted prediction and proscribed threat was too vague to withstand traditional First Amendment analysis, the Court responded that an employer can avoid difficulty "simply by avoiding conscious overstatements that he has reason to believe will mislead his employees." At least the same burden of care can constitutionally be imposed on attorneys who choose to comment about courts before which they are appearing and judicial proceedings that are then pending.

The same principle — that the appropriate degree of First Amendment protection depends upon the context in which the right of speech is claimed — has been reaffirmed in a number of other cases as well. See, *e.g.*, *United States Civil Service Comm'n v. National Association of Letter Carriers*, 413 U.S. 548, 564 (1973) (the government has an

interest in regulating the conduct and the speech of its employees that differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72, n.24 (1976) (commercial speech is subject to "a different degree of protection" than news reporting or political commentary, under which it may be "less necessary to tolerate inaccurate statements").

Just last term, the Court again made it clear that attorneys' speech can generally be regulated more strictly than the *New York Times* rule would permit in the area of libel law. In *Bates v. State Bar of Arizona*, 45 U.S.L.W. 4895, 4904 (U.S. June 27, 1977), after holding that advertising by attorneys may not be subject to blanket suppression, the Court noted that its ruling did *not* mean "that advertising by attorneys may not be regulated in any way." First, the Court stated that as a form of commercial speech, lawyers' advertising is subject to tighter restrictions than those permitted under *New York Times*. Second, because of the public's vulnerability to misleading claims concerning legal services, the Court wrote that "misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." *Id.* And in overseeing the regulation of attorneys' speech in this context, the Court concluded, "we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly." Accordingly, the petitioner's contention — that Mr. Belli was constitutionally entitled to practice *pro hac vice* in the District Court for the District of Columbia unless his conduct was so egregious as to violate the standards of *New York Times Co. v. Sullivan* — is not supported by reason or by this Court's cases.

Even if the applicability of the *New York Times* standard to admissions of attorneys *pro hac vice* were an issue warranting consideration by this Court, the present case

does not afford a proper opportunity to decide the question. In his opinion denying Mr. Belli's admission to retry the *Morris* case, the respondent held that Mr. Belli's statements were "without factual foundation," were "recklessly made," and were "calculated to prejudice the standing of this Court and to cast a shadow upon the integrity of one of its judges." Those findings satisfy the test of *New York Times Co. v. Sullivan* and are amply supported by the record before Judge Gasch.

While petitioners repeatedly state that the false statements made by Mr. Belli were "minor" or "incidental," and that his remarks on the Griffin show were "substantially true," the record shows quite the contrary. The central allegations made by Mr. Belli were that the judge's son represented the hospitals, which were the defendants in the case; that the judge's son was living with him; that the judge had been ordered not to sit on similar cases; that the judge had overturned a large verdict by a black jury in favor of Mr. Belli's black clients; and that all this happened in a court where ten years ago blacks were not permitted to sit on the same side of the courtroom with whites. Mr. Belli admitted at the hearing before Judge Gasch that he had no basis for the charge that Judge Smith's son represented the defendant hospitals, but that he had "intended" to say that his son represented the District of Columbia Medical Society (which was not a defendant in the suit) (Tr. 11). The charge that Judge Smith's son was living with him was based, Mr. Belli said, on an entry in the telephone book showing the same address for the two of them. The statement that the judge had been "told not to sit" on a similar case came from Mr. Belli's associate counsel, who at the hearing recalled that he had had conflicting information on the matter. (Tr. 28-32.) And the charge that the district court's courtrooms had been segregated ten years previously came, Mr. Belli stated, from his "historical appreciation that Washington was a segregated area." (Tr. 8.)

Mr. Belli's televised remarks were made very shortly after the judge had set aside a $900,000 verdict in favor of his clients, and at the very time that a motion was pending in the case to disqualify the judge. Furthermore, they were made in connection with Mr. Belli's contention, during the interview, that he had lost another case because of "the friendship of the judge for the defendant." There was, therefore, sufficient evidence not only to conclude that the charges made by Mr. Belli against the judge were false and recklessly made, but that he had acted with malice toward the Court.

The contention that the decision of the California State Bar, finding that Mr. Belli's remarks had not been shown by "clear and convincing evidence" to have been made with malice, was binding on Judge Gasch is no more persuasive than an argument that Judge Gasch's findings, rendered prior to the Bar's decision, were binding on that body. As the Second Circuit has observed, "The federal courts are not bound by state disciplinary rulings, but must reach their own judgments in these matters." *In re Rappaport*, ____ F.2d ____, 46 U.S.L.W. 2003 (CA 2 June 14, 1977) (slip opinion at 4186). See *Theard v. United States*, 354 U.S. 278 (1957).

2. Petitioners' argument that the decision below denies procedural due process to Mr. Belli is without merit. While respondent did deny the application in this particular case summarily without a hearing, he did so on the explicit basis of his own earlier ruling on an identical application in behalf of Mr. Belli in another case. *In re Belli*, 371 F. Supp. 111 (D.D.C. 1974). In that case, contrary to the representations in the petition, a hearing was conducted on the record during which Mr. Belli was invited to explain or defend his conduct on the "Merv Griffin Show" or to challenge the accuracy of the account of his statements, as well as to respond to other instances of apparent improprieties which had previously been brought to the

respondent's attention.[12] No suggestion was made at that time that the statements under consideration were inaccurate reports of what he said, nor that Mr. Belli had not received a full and fair hearing, and he did not seek review of the court's ruling based upon that hearing.

Thus, even were this Court to adopt the Fifth Circuit's ruling in *In re Evans*, 524 F.2d 1004 (CA 5 1975), that notice and an on-the-record hearing are required before an attorney may be denied admission *pro hac vice* on the basis of prior misbehavior, that requirement would be fully satisfied in this case. The procedures followed by the respondent at the time of Mr. Belli's application to appear in the retrial of the *Morris* case were sufficient to meet the most stringent requirements of due process,[13] and neither the Fifth Circuit nor any other court has suggested that a new hearing should be required on the same issues when the same attorney applies for admission *pro hac vice* in the same court in a subsequent case. Indeed, the Fifth Circuit, since the *Evans* decision, has upheld the refusal of a trial judge, without a hearing, to permit an attorney to participate in the retrial of a criminal case based upon the attorney's conduct during the original trial. *United States v. Dinitz*, 538 F.2d 1214, 1223 (CA 5 1976) (en banc).

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[12]These matters — a book review in the *New York Times* of "The Best Judges Money Can Buy," which Mr. Belli explained was actually written not by him but by the author of the book, and an inquiry by the California Bar concerning advertising of the "Belli Seminars" — formed no part of Judge Gasch's reasons for denying permission to Mr. Belli to participate in the case.

[13]See *In re Rappaport*, ____ F.2d ____, 46 U.S.L.W. 2003 (CA 2 June 14, 1977), where the district judge denied an application to appear pro hac vice on the basis of prior misconduct by the attorney in his home state. The only notice or hearing was a letter from the judge to the attorney inviting him to explain his problems in his home state, and a subsequent telephone call from the attorney to the judge. The Court of Appeals held that the procedure "carefully protected the rights of the defendant and his lawyer" (slip opinion at 4187), and denied a petition for mandamus.

3. Petitioners argue that admission *pro hac vice* may be denied only where the attorney's misconduct is committed in connection with the same case in which he wishes to appear, or is of such a nature as to justify disbarment of a lawyer admitted to practice generally in the court. This argument rests on the statement by the Fifth Circuit in *In re Evans, supra,* that to support a denial of leave to appear *pro hac vice,* the prior misconduct of the attorney must rise "to a level justifying disbarment." 524 F.2d, at 1008. This statement is in apparent conflict with the decision of the Fourth Circuit in *Thomas v. Cassidy,* 249 F.2d 91 (4th Cir. 1957), but for several reasons, this apparent conflict does not warrant exercise of this Court's discretionary jurisdiction.

First, the Fifth Circuit itself appears to have abandoned the panel's ruling in *Evans.* In *United States v. Dinitz,* 538 F.2d 1214 (CA 5 1976), the court in an en banc decision upheld the trial court's refusal to permit an attorney to participate in a retrial based upon his misconduct in an earlier trial, without any finding that such conduct constituted grounds for disbarment. While the majority distinguished the *Evans* holding, five judges in concurring opinions expressed the view that *Evans* should be explicitly modified, and three judges agreed that "whatever vitality *In re Evans* had has necessarily been dissipated by the present en banc decision." 538 F.2d, at 1226 (Brown, C.J., concurring).

Second, there is a compelling reason for application of different standards to admissions *pro hac vice* than to questions of disbarment from practice. An admission *pro hac vice* subjects the attorney to discipline by the court for his actions in the presence of the court, but the attorney does not thereby become generally subject to discipline for violation of the local bar's ethical standards. That fact is illustrated by this very case, where the Committee on Grievances of the bar of the District Court for the District of Columbia found itself powerless to proceed on the

Court's complaint, since Mr. Belli was not a member of the bar of the Court. (See App. A *infra,* p. 2a.) This fact surely entitles a court considering an application to appear *pro hac vice* to require satisfactory assurance that the attorney will comport himself in accordance with the standards expected of members of its bar, and where prior instances of a failure by the non-resident attorney to do so are found, to deny the application even though the prior misconduct might not justify the extreme remedy of disbarment.

Third, the present case does not afford a proper context for this Court to consider the issue of what standards should apply to the exercise of judicial discretion on applications for admission *pro hac vice.* No record was filed in the court of appeals, and repeated references by the petitioners to matters outside the record are, as shown above, grossly inaccurate. The court of appeals felt that the petition for a writ of mandamus was so clearly without merit that no response was requested pursuant to Rule 21(a), Federal Rules of Appellate Procedure, and no opinion was issued. And finally, the prior misconduct of Mr. Belli which formed the basis for respondent's denial of the application would, we submit, meet the most stringent standard for review of a trial court's discretion in this context, and thus affords no opportunity to consider whether a latitude greater than that permitted under *In re Evans, supra,* is appropriate.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Voting: Chief Judge Sirica and Judges Hart, Jones, Corcoran, Gasch, Bryant, Smith, Waddy, Gesell, Pratt, Green, Parker, Richey, and Flannery.

RESOLUTION

WHEREAS there is presently pending in this Court the case of *Morris, et al. v. Children's Hospital of the District of Columbia*, Civil Action No. 575-71; and

WHEREAS Melvin Belli, a member of the Bar of the State of California, was permitted to appear *pro hac vice* in the aforesaid case which was tried before the Honorable John Lewis Smith, Jr., United States District Judge for the District of Columbia; and

WHEREAS while a post-trial motion was pending in the aforesaid case, Melvin Belli appeared on the Merv Griffin Show on May 14, 1973 and participated in a nationwide broadcast and made remarks (appended hereto) which were grossly inaccurate in important respects and which in the unanimous opinion of the Judges of this Court were designed to reflect upon the integrity of the Honorable John Lewis Smith, Jr., upon the administration of justice generally and upon the administration of justice in the District of Columbia in particular; and

WHEREAS the aforesaid remarks of Melvin Belli, in the opinion of the Judges of this Court, constituted a violation of the rules of free press and fair trial and of that Canon of the American Bar Association Code of Professional Ethics which imposes a duty upon a lawyer to maintain a respectful attitude toward the Courts; and

WHEREAS this Court requested its Committee on Grievances to investigate the incident with a view to initiating appropriate disciplinary proceedings against the said Melvin Belli but was advised that the Committee lacks authority to proceed except on complaints registered against members of the bar of this Court;

NOW THEREFORE BE IT RESOLVED by all the Judges of this Court, meeting in Executive Session, that this Resolution be incorporated in the minutes of this session and that a copy thereof, together with a copy of the transcript of the remarks of Melvin Belli above identified, be forwarded by the Chief Judge of this Court to the Disciplinary Committee of the Bar of the State of California for such action as it deems appropriate in the circumstances.

BY THE COURT:

/s/ John J. Sirica
Chief Judge

July 11, 1973

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1680

IN RE MARY ALICE RELF, MINNIE RELF and KATIE RELF, by and through their next friend, LONNIE RELF, Petitioners

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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Dated, August 19, 1977.

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PETITIONERS' REPLY BRIEF

I. MR. BELLI'S TELEVISED REMARKS WERE NEITHER RECKLESSLY MADE NOR UTTERED IN COMPLETE DISREGARD OF THEIR FACTUAL ACCURACY.

The instant Petition raises fine and difficult issues concerning the extent to which an attorney may exercise his First Amendment right to express himself freely without fear of civil and professional reprisal. Rather than direct its argument exclusively to these issues, Respondent has sought to repeat and mischaracterize Mr. Belli's expression while minimizing and dismissing his right to make them.

Respondent expends great effort in reinjecting the substance of Mr. Belli's purported "prior misconduct . . . which formed the basis for respondent's denial of the application [for admission *pro hac vice*] . . ." (Brief for Respondent [hereinafter Resp.Br.] at 3-4, 6-7, 13-14, 17) without giving any credence whatsoever to the findings of the Local Administrative Committee of the State Bar of California exonerating Mr. Belli of any professional "misconduct." (Petition for Certiorari [hereinafter Pet.] App. vii-xii).

Inasmuch as the State Bar committee was the only fact-finding body to conduct a formal, noticed, evidentiary hearing on the propriety of Mr. Belli's "Merv Griffin Show" remarks, Respondent's characterization of Mr. Belli's conduct is both gratuitous and offensive and requires that the record be set straight.

It is conceded by all parties that after the three-week trial of *Morris v. Children's Hospital,* Civ. No. 575-71 (D.D.C. Apr. 18, 1973), the jury returned a verdict in the sum of $900,000, which at the time was the largest medical malpractice judgment ever awarded in the District of Columbia. Judge Smith then reversed the jury verdict and ordered a new trial on the ground that the mention of insurance had irrevocably prejudiced the jury.[1] On motion of the plaintiff Judge Smith disqualified himself from sitting on the new trial that he had ordered, and the *Morris* case was settled by counsel for only $150,000

[1]It has always been contended that the subject of insurance in that case was first interjected by defense counsel. See pp. 15-21 of the file copy of the transcript [hereinafter Tr.] in the matter of *Morris v. Children's Hospital* filed by Respondent with the Clerk of this Court.

as the client was unwilling to proceed without Mr. Belli.

Significantly, the committee of the State Bar of California, after an exhaustive evidentiary review of the conduct of the *Morris* litigation, found that Judge Smith had given Mr. Belli a "bad time" during the trial. (Pet. App. xi). In fact, at several points before and during the trial, Judge Smith threatened to appoint a guardian ad litem for the blind minor plaintiff because of Mr. Belli's lack of knowledge of tort law and his "unreasonableness" in not accepting a defense settlement offer of $50,000 to $60,000. Judge Smith has also declared his belief that medical malpractice is an improper matter for a jury to determine.[2]

It was in the context of the revelations concerning Judge Smith's highly prejudicial family relationship —and the subsequent outrage and bitter disappointment of plaintiff's counsel for their client—that Mr. Belli uttered his comments on the Merv Griffin Show.

[2]Deposition of John Lewis Smith, III, *In the Matter of Melvin Mouron Belli,* S.F. 2247, Before Local Administrative Committee of the State Bar of California at pp. 91-92:

Q. Have you and your son ever discussed medical malpractice litigation generally?

A. After this case, not prior to that time.

Q. What have you discussed with your son regarding medical malpractice litigation?

A. Since this, I feel now that there is some other way that these matters should be handled.

Q. What other way do you suggest?

A. I do not know whether this is material. I am perfectly willing to tell you. I think there ought to be a commission or a committee composed of doctors and lawyers to evaluate. *I do not think they really are proper matters for a jury to determine. They cannot possibly evaluate medical malpractice.* [Emphasis added.]

The remarks, moreover, *were* substantially true, and where inaccurate were so in minor and incidental details.

The itemized comparison below between the complete televised statements and the relevant facts persuasively demonstrates the substantial truth of those remarks and the absence of any malicious or reckless element in their utterance.[3]

Mr. Belli's Remarks	Facts
1. "I had one in Washington, D.C. the other day where the judge turned out to have a lawyer who represents all of the hospitals in the district and we were suing the hospitals. It was his son. . . . . I think that judge was wrong in sitting on that case . . . having his son *representing the Medical Association of the District of Columbia.* . . ." (Emphasis added.)	1. The Judge's son was a member of the law firm which represented the District of Columbia Medical Society, whose membership includes 90% of the physicians in the District of Columbia. Physicians who do not become members of the Society cannot obtain hospital privileges or malpractice insurance. In *Morris*, all the witnesses for defendants belonged to the Society represented by Judge Smith's son. This fact was never revealed to counsel for plaintiff before trial. Although Mr. Belli originally misspoke when he stated at the beginning of his remarks that Judge Smith's son represented the hospitals—an error which he readily and repeatedly conceded in the *in camera* proceeding before Judge Gasch (Tr. at 10-11)—Mr. Belli clarified the statement by correctly identifying Judge Smith's son as representing the District of Columbia Medical Society.

[3]The full text of Mr. Belli's "Merv Griffin" remarks are reproduced in Pet. App. viii-x.

Mr. Belli's Remarks	Facts
2. "I had one in Washington, D.C. the other day where the judge turned out to have the lawyer who represents all of the hospitals in the district and we were suing the hospitals. *It was his son and he was living with him.*" (Emphasis added.)	2. Judge Smith conceded to the committee of the State Bar of California during its investigation of this incident that his son lived with him at Tracy Place until as recently as three years before Mr. Belli's "Merv Griffin" remarks. Also, it was admitted that the then current District of Columbia telephone directory listed both father and son at the same address and had never been corrected.
3. "I think the judge was wrong in sitting on that case *when he knew that he had been excused from similar cases against a similar defendant* and then having his son represent the Medical Association of the District of Columbia and living with him." (Emphasis added.)	3. Judge Smith had recused himself in *Wagstaff v. Children's Hospital, Inc.* (Civ. Nos. 1275-72 and 2448-72), a case involving the identical defendant as in *Morris*, after Dr. Wagstaff had "not only authorized" but "instructed" his attorney to tell Judge Smith that it would be his (Dr. Wagstaff's) feeling in view of Judge Smith's son's connection with the D.C. Medical Society that "perhaps it would be better" if the matter were assigned to some other judge.[4] Despite Judge Smith's "standard

[4]The following is a partial transcript of the pre-trial recusal hearing in *Wagstaff v. Children's Hospital*. (Civ. Nos. 2448-72; 1275-72).

MR. McCARTHY (counsel for plaintiff): I received a phone call about ten or twelve days ago from my associate counsel who indicated to me that they had heard that your son was General Counsel of the District of Columbia Medical Society.

They felt it was a matter that they should take up with Dr. Wagstaff and they have taken it up with Dr. Wagstaff and he has not only authorized me, but instructed me to suggest to the Court that it would be his feeling, in view of your son's association with the D.C. Medical Society,

Mr. Belli's Remarks	Facts
	practice" of informing attorneys where there is even the "possibility" of a conflict of interest in a case involving a doctor, Judge Smith neglected to inform Mr. Belli of any of the circumstances surrounding his self-disqualifications in a case involving the same defendant just twenty or twenty-one days previously.
4. "And here was a wonderful thing to see. *Here in Washington, where they [Blacks] couldn't sit on the same side of the courtroom ten years ago.* Now, we're dependent on blacks there to give us justice. And they give good justice."	4. When apprised that his statement regarding segregation in the federal courtrooms of the District of Columbia was erroneous, Mr. Belli apologized and said that he had been under a mistaken impression due to similar practices which existed in the South and due to patterns of segregation which had persisted in the District of Columbia until the recent past. (Tr. 5-9)

that perhaps the matter should be assigned to some other judge.

I am here this morning and I want to note on this record that I am not moving to disqualify or recuse your Honor.

I have never done that and I do not intend to, but my clients have suggested and since they are doctors themselves, it might be better if this Court would disqualify himself in this matter. Thank you.

MR. SCANLON (defense attorney): On that motion, I have really nothing to say. I would rather not see you do.

THE COURT: Actually, Mr. McCarthy, came in and discussed the matter with me.

We went to the Acting Chief Judge.

I think it is probably better. I have anticipated this.

As a matter of fact, I suggested that I should disqualify myself in all medical malpractice cases, but the feeling of the Court was that that should not be done because of the number of these cases pending, but in view of the call Mr. McCarthy received, I think it would be better that I sent it back. [Emphasis added.]

On the basis of these facts, in addition to a complete evidentiary record supplied by all interested parties, the hearing committee of the State Bar of California exonerated Mr. Belli of all charges of ethical impropriety or professional wrongdoing stemming from his televised remarks. The committee measured Mr. Belli's statements against the standards set forth by this Court in *New York Times v. Sullivan,* 376 U.S. 254 (1964) and found insupportable the accusation that Mr. Belli was grossly negligent in making his statement, or that he made his remarks with knowledge of their falsity or with disregard of their truth or falsity. (Pet. App. xii).

Respondent ignores the results of the exhaustive three-day adversary hearing held by the Local Administrative Committee of the State Bar of California. Instead, Respondent asserts that the *in camera* proceeding relating to Mr. Belli's application to be admitted *pro hac vice,* held before the favorable resolution of State Bar of California proceedings, adequately and finally adjudicated the issue of Mr. Belli's professional conduct and right to practice his profession before a court of the United States.

Such an assertion is deeply troubling in its implications. Judge Leventhal spoke to that point when he observed in his dissent below:

> Of course, the District Judge's finding that Belli's statements were 'recklessly made . . . in complete disregard as to the factual accuracy of his statement' is in apparent conflict with the conclusion of the State Bar Committee. However, the District Judge's opinion does not state that the

> standards of *New York Times v. Sullivan* were being applied. Absent some clear indication, I am reluctant to conclude that the District Judge relied on the question whether Belli's remarks are protected by the First Amendment. In any event, it does not appear that the District Judge held an adversary hearing on the matter. *In re Relf*, No. 76-2073 (D.C. Cir. Mar. 3, 1977) Leventhal, C.J., dissenting).

As to the *in camera* proceeding before Judge Gasch to which Respondent attaches constitutional effect, it should be observed that no notice was provided to Mr. Belli that there would be a full and final adjudication on the issue of whether his comments were "recklessly made" and whether he "acted in complete disregard as to the factual accuracy of his statements." While the transcript of that proceeding[5] does indicate a general awareness that the "Merv Griffin" remarks would be discussed, Mr. Belli was never apprised that the purpose of the *in camera* conference was to determine whether he had been guilty of such professional misconduct as to cast him beyond the ambit of the protection of the First Amendment and prevent him from practicing his profession in a court of the United States.

The nature of the proceeding before Judge Gasch in 1973 was thus thoroughly unexpected. Though an

[5]Petitioners were in error when they stated that no record was kept of this proceeding. Because of the extraordinary circumstances surrounding the *in camera* conference with Judge Gasch, Petitioners were simply unaware that a transcript was available or had been made.

informal conference may have been anticipated by the parties, a "hearing" was not. That this informal, *in camera* conference provided the grist for a published opinion in the Federal Supplement is both amazing and inexplicable. The *in camera* proceeding consisted of little more than Mr. Belli seeking to explain the substance of his "Merv Griffin Show" remarks. No written briefs of law were requested; no testimony was taken; no documentary evidence was admitted; no mention was made of *New York Times v. Sullivan* or the First Amendment; and no indication was made as to the burden of proof and who bore it.

Most notably, no reference was ever made during the *in camera* proceeding to the applicable principles of the law against which Mr. Belli's conduct would be judged, or could be judged. It is clear that no hearing that comports with any recognized notion of due process was held. Even assuming, arguendo, that a sufficient hearing had been had, the record could not by any stretch of the imagination support the finding of *In re Belli*, 371 F. Supp. 111, 113-14 (D.D.C. 1974), that Mr. Belli's remarks were made "recklessly" and "in complete disregard as to the factual accuracy of the statements."

Indeed, although Judge Gasch ostensibly appropriated the language of *New York Times* to cast Mr. Belli's remarks outside the pale of protected speech, he failed to provide any of the accompanying safeguards required by *New York Times* before doing so, such as the need to obtain clear and convincing proof that the remarks were made recklessly or in conscious

disregard of their factual accuracy. *New York Times v. Sullivan, supra,* 376 U.S. at 286. To announce, as Respondent does, that the court's finding in *In re Belli, supra,* satisfies the test of *New York Times v. Sullivan* because of its ceremonial use of certain key words is to exalt form and banish substance.

Respondent further asserts that Mr. Belli did have the "full opportunity" to dispute the statements that had been attributed to him, but did not suggest that the statements attributed to him were factually inaccurate. The contention is defective in several respects.

First, Mr. Belli did not have the full opportunity to contest the false charge that he spoke recklessly and in complete disregard of the truth. Mr. Belli was given no notice that he would ever have to meet such a charge at an informal meeting. Further, Mr. Belli was not given a full and adequate opportunity to dispute the factual accuracy of certain statements that are attributed to him. The trial court, and Respondent's brief, have continually ascribed to Mr. Belli the statement that Judge Smith's son represented the hospitals of the District of Columbia. Nowhere in either the opinion, *In re Belli, supra,* or Respondent's brief is it acknowledged that Mr. Belli also correctly identified Judge Smith's son in his remarks as actually representing the District of Columbia Medical Society. By so doing, the context and substance of the remarks have been distorted to suggest that Mr. Belli's only reference to the son was as a representative of the hospitals. This is simply untrue, and to convey such an impression is to attribute to Mr. Belli

statements which he never made and a culpable state of mind which the evidence shows he never possessed.[6]

Respondent's assertion that Mr. Belli had a "full opportunity" to dispute the accusations and put on his whole defense to meet the false charges hurled at him is thus meritless.

II. THE SUMMARY DENIAL OF MR. BELLI'S APPLICATION TO APPEAR PRO HAC VICE CONTINUES TO PUNISH MR. BELLI FOR EXERCISING HIS FIRST AMENDMENT RIGHTS.

Regardless of how one might characterize the *in camera* proceeding held before Judge Gasch in 1973, a court may not punish a citizen either criminally or civilly for exercising rights protected by the First Amendment. *New York Times v. Sullivan, supra,* at 276, 270-280.

The issue squarely before this Court is whether an attorneys remarks, uttered without conscious knowledge of their falsity or in reckless disregard of the truth, should subject him to professional and civil disability where the comments were not made in the presence of the court or during the course of a trial and did not pose an imminent threat to the administra-

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[6]In any event, since no individual was ever mentioned by name, the alleged calumny of Judge Smith seems de minimis to Petitioners even if all the remarks attributed to Mr. Belli were accurate, which they are not. There seems to be more here than meets the eye, and perhaps Mr. Belli's high profile representation of tort plaintiffs through the years, and the adequate awards which he has recovered for them in almost every jurisdiction of this country—except in Washington, D.C., where awards are notoriously low—has generated exceptional sensitivity to the content of his pubic remarks.

tion of justice. Under these circumstances there is *no* authority for the proposition that an attorney's right to speak—or the public's right to hear an attorney—is constitutionally more restricted than that of a citizen generally.

Indeed, this Court has long held that absent an *imminent threat* to the administration of justice, a judge may not punish one "who ventures to publish anything that tends to make him unpopular or belittle him. . . ." *Craig v. Harney,* 331 U.S. 367, 376 (1947); *see also, Wood v. Georgia,* 370 U.S. 375, 389 (1962).

Admittedly, because of an attorney's sensitive relationship to the administration of justice, statements by him may tend to be more imminently threatening than the same remarks uttered by a layman. But the test still remains whether the words posed an imminent threat. Unkind or erroneous statements alone—absent "malice" or disruptive potential—are simply insufficient to support a court's attempt to punish an attorney who publicly criticizes a court. As Justice Brennan noted in *In Re Sawyer,* 360 U.S. 622, 636 (1959):

> We can conceive no ground whereby the pendency of litigation might be thought to make an attorney's out-of-court remarks more censurable, other than that they might tend to obstruct the administration of justice. *Remarks made during the course of a trial might tend to such obstruction where remarks made afterwards would not.* (Brennan, J., concurring). (Emphasis added).

Only when a speaker attempts "to obstruct or prejudice the due administration of justice by interfering with a fair trial" do ethical precepts require abstention from what in other circumstances might be constitutionally protected speech. See *In re Sawyer, supra,* 360 U.S. at 647; (Stewart, J., concurring); see also, *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring); *Sheppard v. Maxwell,* 384 U.S. 333, 363 (1966).

It has never been alleged, nor could it be, that Mr. Belli's televised remarks tended to obstruct judicial proceedings in progress or prejudice the fair outcome of a trial. Mr. Belli's statements were made after the conclusion of the *Morris* trial and outside the presence of the court. The words carried with them no threat of interference with any pending judicial proceeding; no obstruction of any trial; and no spectre of prejudice to any party or legitimate interest.

Respondent's reliance on this Court's recent ruling in *Bates v. State Bar of Arizona,* 45 U.S.L.W. 4895 (U.S. June 27, 1977) for the proposition that an attorney's access to the First Amendment is more restricted than that of members of other professions is thoroughly wrong. This Court forthrightly held in that case that disciplinary rules promulgated by a state bar which interfere with protected speech must yield to the command of the First Amendment. 45 U.S.L.W. at 4903. In the context of commercial speech, and in order to protect unsophisticated consumers likely to be misled by false legal advertising, the Court did, however, suggest more careful regula-

tions might be appropriate for the advertisement of legal services than for other professional services more familiar to the public. 45 U.S.L.W. at 4904.'

III. THE SUMMARY DENIAL OF MR. BELLI'S APPLICATION TO APPEAR PRO HAC VICE DEPRIVES HIM OF THE RIGHT TO PRACTICE LAW IN A FEDERAL COURT WITHOUT DUE PROCESS.

This Court long ago held:

> If in any case, state or federal courts were to arbitrarily refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense. *Powell v. Alabama,* 287 U.S. 45, 69 (1932).

Respondent has conceded that Mr. Belli's application to appear *pro hac vice* was denied summarily without a hearing. In fact, the court refused not only to consider the significant development of his exoneration of charges of professional misconduct by the

'Respondent's reference to *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969) is inapposite. In that case the Court held that it was inappropriate to apply the *New York Times* standard to an employer who violated section 8(c) of the National Labor Relations Act by expressing to his employees views regarding unionism which contained a "threat of reprisal or force or promise of benefit." 395 U.S. at 617-18. The Court reached its decision on the basis of the unique context of the labor relations setting where an employee's fundamental constitutional right to associate freely could only be acquitted by incidentally restraining the employer from exercising his economic preeminence to subvert that right. 395 U.S. at 617. Petitioners fail to see how denying Mr. Belli the full protection of the First Amendment under the instant circumstances will vindicate any countervailing constitutional rights or public interest.

Committee of the California State Bar, but also refused even to permit the filing of a written motion and order on Mr. Belli's behalf. (Pet. App. vi).

Respondent argues that the informal *in camera* proceeding held before Judge Gasch in 1973 in an entirely unrelated matter, and under the questionable procedural circumstances described above, satisfied due process requirements for purposes of denying Mr. Belli's admission *pro hac vice* in the case of *Relf v. United States.* There can be no basis for such an argument.

Two recent federal court opinions underscore the glaring absence of procedural due process afforded to Mr. Belli, even if it be assumed that the *in camera* proceeding of 1973 was sufficient to constitute a hearing for purposes of denying an application for admission *pro hac vice* in an entirely unrelated matter in 1976.

In *Flynt v. Leis,* ___ F. Supp. ___, 46 U.S.L.W. 2029 (S.D. Ohio July 26, 1977) the court held:

> There can be no doubt that admission and removal of foreign counsel are matters within the sound discretion of the trial court. But the exercise of sound discretion can only follow a due process hearing after notice and an opportunity for counsel to defend himself and his professional reputation. There are grave implications inherent in any arbitrary exclusion of counsel. Aside from the obvious immediate loss of income, an attorney summarily removed without cause or opportunity to be heard must suffer an irreparable blow to his professional standing and his future

employment prospects. While the attorneys' interest in reputation alone is insufficient to implicate property rights under the Fourteenth Amendment, it is true that once an "interest" has been initially recognized and protected by state law or the Constitution, a deprivation or restriction of that "interest" resulting in injury to reputation requires procedural safeguards. The attorney's admission to appear pro hac vice was such a property interest and its termination without due process violated their Fourteenth Amendment rights. 46 U.S.L.W. 2029.

In accord is *In re Rappaport,* ..... F.2d ....., 46 U.S.L.W. 2003 (2d Cir. June 14, 1977). In that case the trial judge refused to permit the admission *pro hac vice* of a non-resident attorney to retry a case in which the attorney had been guilty of misconduct. The Second Circuit affirmed the denial on the grounds that first, the judge made his determination after proceedings which carefully protected the rights of the defendant and his lawyer, and a decision not to admit the attorney was amply supported by all the uncontradicted evidence; second, the judge looked to the disciplinary standards of the admitting state and found that the attorney's conduct was such as would subject him to disbarment; and third, the attorney was guilty of unethical conduct during the course of the first trial by testifying in his client's behalf, and would probably have sought to testify at the second trial as well.

By way of comparison, it should be noted that Mr. Belli has neither been afforded proceedings which carefully protected his rights, nor has he ever been

found guilty of any professional misconduct under either California or Washington, D.C., disciplinary standards. There is utterly no legal precedent for denying Mr. Belli admission *pro hac vice* under the circumstances here.

The Fifth Circuit's recent decision in *United States v. Dinitz,* 538 F.2d 1214, 1223-24 (5th Cir. 1976), further confirms Petitioners' contentions in this respect. There, the majority of the court sitting en banc reaffirmed the principles of *In re Evans,* 524 F.2d 1004 (5th Cir. 1975). In finding that the facts before it did not call for the application of *Evans,* the Court in *Dinitz* observed:

> *Evans* merely attempted to establish standards applicable to a *pretrial* motion to appear *pro hac vice . . . Since a pretrial hearing would not interrupt any ongoing trial proceedings, fundamental fairness may require such a hearing in most of these situations. . . . Evans* at least requires an attorney to make some showing to the court that he is qualified and ready to appear *pro hac vice. If the court then decides not to admit him, the attorney may well be entitled, in most cases, to hear the court's reasons for denying him admission and to defend his qualifications at a formal hearing.* 538 F.2d at 1223-24. (Emphasis added.)

It bears repeating that Mr. Belli has asserted before the District Court and the Court of Appeals for the District of Columbia that he is a member in good standing of the California Bar, that he has joined of record a member of the District of Columbia Bar in the case in which he desires and deserved to appear and otherwise complied fully with the applicable local

rule, that he has not been accused or found guilty of any improper or unlawyerlike conduct in relation to the case in which he now wishes to appear *pro hac vice,* and that he has not been found guilty as a result of any formal, regular hearing of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court. In fact, when finally afforded a *full and fair* hearing on his remarks on the *Morris* case, Mr. Belli was exonerated of all charges of wrongdoing. Petitioners reassert that under these circumstances no authority exists in law or policy for the notion that a trial court may exercise its discretion to deny Mr. Belli's admission *pro hac vice.*

IV. CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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